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DEALING WITH PUBLIC-SECTOR LABOR DISPUTES: AN ALTERNATIVE APPROACH FOR CALIFORNIA

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During the fall of 2003, a strike of transit workers lasting over a month halted service on much of Los Angeles County's bus and rail lines. Ultimately, the strike was settled by an impasse procedure that was voluntarily adopted by labor and management. That procedure, which we dub here as "binding-nonbinding arbitration," could be adopted more widely for transit labor disputes or other disputes in California's public sector – perhaps through legislation or simply through more widespread voluntary use. In this chapter, we first provide a "crash course" on labor relations – on the assumption that the reader does not have a background in the field – and then describe the specifics of the binding-nonbinding arbitration approach. Readers with a labor relations background may prefer to skip the next section.

A Crash Course in U.S. History of Regulating Union-Management Relations

Although there were union-like organizations even before the American revolution, labor relations as we know it today developed largely in the 20th century. The Great Depression of the 1930s might have been expected to undermine the labor unions of that era in the face of mass unemployment, falling wages, and competition for jobs regardless of conditions of work. But in fact the reverse occurred. Worker anger at deteriorating conditions led to major strikes and industrial unrest, sometimes accompanied by violence. California was not spared in this episode; one of the seminal events of the era was the 1934 "general strike" in San Francisco that started among longshoremen and spread throughout the city. Economic activity was paralyzed for a time and the state's National Guard was called out before the strike ended.

In response to the climate of unrest throughout the U.S., Congress passed the National Labor Relations Act of 1935, also known as the Wagner Act. This statute notably excluded two major categories of employees: farm workers and public-sector workers. Those omissions opened the door to later state regulation of labor relations in those two areas. California moved to fill in both of those voids, especially in the 1960s, 1970s, and 1980s.¹ In addition, the Wagner Act does not cover the new Indian gambling casinos that have been developed or authorized in California, and the state has also moved to fill that gap in recent tribal compacts.²

The Wagner Act had two principal elements: 1) the concept of elections within an "appropriate bargaining unit" to determine whether a group of workers wanted a particular union to represent it in dealing with an employer,³ and 2) a list of "unfair labor practices" which were forbidden to employers. It also established an administrative

agency – the National Labor Relations Board (NLRB) – to conduct representation elections and rule on unfair labor practices. A 1937 decision of the U.S. Supreme Court endorsing the constitutionality of the Wagner Act set a precedent for a substantial widening of federal regulation of economic activity.⁴ And a roughly parallel process evolved for regulating labor relations involving railroad and airline workers under the Railway Labor Act administered by the National Mediation Board.⁵

During the Great Depression, the U.S. had moved toward the left of the political spectrum. New programs such as Social Security were inaugurated in the 1930s. But the country became more conservative in the 1940s and 1950s and the Wagner Act was modified by the Taft-Hartley Act (1947) and the Landrum-Griffin Act (1959). The former Act added and enumerated a series of unfair labor practices that unions were forbidden to commit, whereas the Wagner Act provided only a list of practices forbidden to employers. Taft-Hartley also created the concept of decertification elections whereby workers could remove a union as their representative whereas the Wagner Act provided only a mechanism to select a union. Proponents thus saw the Taft-Hartley Act as providing “balance” in labor relations since both sides could be guilty of unfair labor practices and since workers could remove unions as well as selected them.⁶

Taft-Hartley established a procedure whereby the President could obtain a court injunction preventing work stoppages for a limited period in the case of “national emergency disputes.”⁷ And it created the Federal Mediation and Conciliation Service (FMCS) to offer the assistance of professional mediators as facilitators in resolving bargaining impasses.⁸ The later Landrum-Griffin Act largely involved regulating internal union affairs such as procedures for election of union officers. Landrum-Griffin provides what is termed a “bill of rights” for union members with regard to the members’ role in governing unions. It also added still more detailed provisions covering unfair labor practices and representation elections to the already-amended Wagner Act.

With the exception of some special procedures for the health care sector adopted in 1974, there have been no major changes in the federal legislation regulating private-sector labor relations since 1959. Changes in policy since then have come mainly from court decisions and from NLRB interpretations and reinterpretations of the amended Wagner Act. Federal legislation and policy largely pre-empts state action in regulating labor relations in private, nonfarm employment. But – as noted - states remain free to set labor relations policy covering state and local government employment within their jurisdictions (and for agriculture).

Until the 1960s, with only limited exceptions, unions in the public sector were devoted to lobbying on behalf of their members. At the federal level, there was a long history of unions representing various groups of postal workers and lobbying for their interests before Congress. The National Education Association (NEA) – which is today the largest American labor union – has a history of such advocacy for public school teachers at the state and local levels going back to the 19th century.⁹

To the extent that there was regulation of unions in the public sector, it was mainly limited to federal and state bans on strikes. A major shift began to occur in 1962 when President John F. Kennedy issued an executive order (No. 10988) providing for limited recognition and bargaining rights for labor unions of federal workers. Despite a federal ban on strikes, a postal strike led to creation of the quasi-autonomous U.S. Postal Service in 1970 with its labor relations to be regulated by the National Labor Relations Board. Postal strikes remained banned but impasses in bargaining were to be settled by arbitration.

A separate system of labor relations regulation for other federal workers – under the Civil Service Reform Act – was established by statute in 1978. A new agency, the Federal Labor Relations Authority, was created to perform functions for federal employment similar to those of the NLRB.¹⁰ Generally, however, the “scope of bargaining” for non-Postal federal employees is quite limited since Congress sets basic pay and benefits. In a famous incident, federal air traffic controllers – who attempted to strike for higher pay – were fired and replaced by the Reagan administration in 1981.

In part because of the evolving federal example, state governments in the 1960s and later – including California’s – began to create their own systems of regulation for state and local employees. Looking around for guidance in how to craft the necessary laws, state legislatures turned naturally to the model that had been enacted earlier for the private sector. They often took large chunks of the language of the amended Wagner Act and dropped them into state law with modification. Common modifications included some unionization rights for supervisory employees – who in contrast were excluded from the protections of the amended Wagner Act – bans on the right to strike, and impasse procedures to settle disputes such as compulsory arbitration.¹¹

The irony of this history of copying the private model was that private unionization as a fraction of the workforce had been declining since the mid-1950s. In contrast, public-sector collective bargaining was expanding. Government workers were unionizing and labor organizations in the public sector that had been mainly involved in lobbying – such as the NEA – were moving toward collective bargaining. Thus, a system in decline became the model for a system that was growing. Indeed, given current trends, some observers argue that unionization will become mainly a public sector phenomenon in the future.¹²

California’s System of Public-Sector Regulation of Labor Relations

Apart from some special arrangements for public transit – discussed below – California’s first significant foray into public-sector labor relations was the George Brown Act of 1961 (pre-dating the Kennedy executive order). This law granted public-sector workers the right to join unions and gave such unions the right to “meet and confer” with management before important personnel policies were adopted. Although an attempt was made in the 1970s to develop a comprehensive and more detailed public-sector statute, eventually most state and government workers in California came to be covered by four separate laws.

These four California laws borrowed heavily from the federal amended Wagner Act framework. Bargaining and labor relations under all four are regulated by the Public Employee Relations Board (PERB), a counterpart to the private-sector's NLRB. PERB conducts representation elections and rules on unfair labor practices for state and local workers just as the NLRB does in the private sector.¹³

The first of the four major California statutes was the Meyers-Milias-Brown Act of 1968 (MMBA) that covers local governments. This law permits local governments to enact their own labor relations procedures, subject to general principles set out in its provisions. Originally, the local authorities were expected to create their own administering agencies rather than to utilize PERB. However, in 2001, PERB became the administrator with the exception of workers for the City and for the County of Los Angeles. In those two jurisdictions, local commissions still oversee the labor relations systems.¹⁴

Public transit districts – although local – are exceptions to Meyers-Milias-Brown. Their labor relations processes are defined by the statutes creating these districts. Often transit systems were once privately operated and were subject to the federal Wagner Act until they became public. As a result, they inherited a tradition of collective bargaining and union-management relations. That tradition was reflected in the enabling statutes and remains largely outside the jurisdiction of PERB.

The bargaining tradition was reinforced by Section 13(c) of the federal Urban Mass Transit Act of 1964, a law providing federal subsidies to local transit systems. Section 13(c) provided, and continues to provide, various protections for workers when private transit systems are taken over by public entities. Among the protections is continuation of collective bargaining rights, although the precise application of these rights is left for local negotiations.¹⁵ It also provides protections when public agencies contract out for transit services to private firms, an issue that was probably not foreseen in 1964. Privatization has become more significant as public transit authorities have sometimes seen contracting out as a way to reduce cost.¹⁶

To the extent that representation elections are needed in California transit districts, they are conducted by the State Mediation and Conciliation Service (SMCS).¹⁷ The one exception with regard to PERB and transit is a special law enacted in 2003 that puts supervisory workers at the Los Angeles County Metropolitan Transit Authority (LACMTA) under PERB jurisdiction.¹⁸ However, transit districts are covered by a (limited) state system of impasse resolution described below.

The other three major California public-sector statutes enacted after MMBA are the Educational Employment Relations Act of 1975 (Rodda Act) that covers K-14 education,¹⁹ the State Employer-Employee Relations Act of 1977 (Dills Act) that covers state civil servants other than those in higher education, and the Higher Education Employer-Employee Relations Act (HEERA) of 1978, covering the two state university systems.²⁰ These laws differ in their provisions, reflecting the services covered.²¹ For example, the faculty Academic Senates of the two university systems are given

recognition in HEERA for their roles in what is often termed “shared governance” with management.²²

At the time the various California statutes were adopted, it was widely assumed that state and local employees did not have a legal right to strike. The statutes themselves neither granted a right to strike nor did they prohibit strikes. In 1985, however, the California Supreme Court ruled that strikes of public employees were not prohibited unless banned by specific legislation or unless there was an imminent threat to safety and health.²³ Explicit strike bans do exist in California, but only for a limited number of protective service workers such as police and firefighters.

Thus, unlike federal workers and government workers in many other states, most public workers in California have a *de facto* right to strike.²⁴ Of course, strikes sometimes occur, even in the face of legal prohibitions. In some instances, unions or public workers may try to circumvent strike bans by such tactics as slowdowns or sick-outs. However, where there are strike bans in place, unions and strikers may be subject to penalties and courts may intervene if quasi-strike tactics are utilized.

Settling Impasses

Typically, the end-product of a collective bargaining negotiation is a written contract, commonly called a “memorandum of understanding” in California’s public sector. These contracts specify terms and conditions of employment such as pay, criteria for merit increases and promotions, work rules, and grievance procedures. These agreements have a fixed duration that is seldom less than one year and often is longer.

Union contracts can be quite detailed. In a sample of California public-sector contracts described more fully below, the mean number of contract pages was 120, with a minimum of 15 and a maximum of 420. Contracts are negotiated either when a prior contract expires or when a newly-unionized group first bargains with management. It is not unusual in the public sector for the negotiations process to continue for a long time, especially in times of fiscal tightness. Thus, there may be a hiatus between the expiration of a contract and its replacement by a new one. When such a hiatus occurs, the new contract is often made retroactive to the expiration date of the prior agreement.

Rights Arbitration

Two types of disputes occur under collective bargaining – whether public or private. When a contract is in effect, there may be a dispute about the meaning of a particular contractual provision or about how a provision is to be applied. Such disagreements are called “rights” disputes. In contrast, when a new contract is being negotiated or renegotiated, but no agreement can be reached on its terms, the disagreement is termed an “interest” dispute.

Contracts typically specify a grievance and arbitration mechanism for resolving rights disputes. A common form of grievance is a complaint by an individual employee that he or she was improperly subject to discipline (which can range from an adverse

notation in a personnel file to discharge). Contracts generally require that discipline be administered only for “cause” or for “just cause.” The employee may dispute the circumstances of discipline under such a provision and argue that the discipline was either excessively harsh or unwarranted.

If, after using the contractual grievance procedure, union and management representatives are unable to resolve a rights dispute, the contract generally requires rights arbitration.²⁵ Under arbitration, a neutral party hears both sides and then renders a binding decision. Right arbitration is usually performed by private professional arbitrators – often with legal backgrounds – who are employed by the parties for that purpose.²⁶ Although arbitrators look to the contract language for guidance in rendering decisions, over many years a kind of common law for interpreting such phrases as “just cause” has evolved.

Within the private sector, while rights arbitration is virtually universal, interest arbitration is rare, although the parties are free to agree voluntarily to use it. Within the public sector, rights arbitration is also standard practice. However, there may also be legislated requirements for the use of interest arbitration in the event of an impasse in contract negotiations (compulsory arbitration). For example, at the federal level, impasses in Postal Service interest disputes are required to be resolved by compulsory arbitration. And as an example at the state level, Connecticut requires arbitration to resolve school teacher interest disputes.

Interest Arbitration

Where interest arbitration is used, it can come in two basic forms. Under “conventional” arbitration, the arbitrator hears both sides and then renders a decision that generally is a compromise somewhere between what the union is demanding and what management is offering. This type of interest arbitration is used in Postal Service cases. But it is sometimes argued that if the parties believe an arbitrator will eventually “split the difference” between them, they will take extreme positions in prior negotiations, thus making a voluntary settlement difficult. To avoid this so-called “chilling effect,” an alternative approach is to impose “final-offer” arbitration.

Under the final-offer approach, the arbitrator must pick one side or the other without compromise. The theory is that both sides will compete to appear reasonable in their offers since the arbitrator will pick the more reasonable position of the two. Thus, it is argued, the parties will be more likely to reach a resolution on their own - without needing arbitration - since they will tend to converge on reasonableness. Connecticut’s compulsory arbitration process for school teachers uses the final-offer version.²⁷ Within final-offer, there are two approaches. In one version, the arbitrator selects the entire package proposed by either the union or management. In another version, the arbitrator makes selections on an item-by-item basis. Thus, the arbitrator might pick the wage offer of management but select, say, the health insurance offer of the union.

A considerable research literature began to develop in the 1970s and 1980s concerning the two types of interest arbitration and whether conventional arbitration in

fact produced the alleged chilling effect. Some studies were done using laboratory simulations. Others involved surveys of actual arbitrators who are asked to resolve hypothetical disputes. Finally, an empirical literature developed using results from jurisdictions that relied on arbitration as an impasse procedure to test its effect on dispute resolution and pay outcomes.

Suffice it to say that a model of arbitrators who mechanically split the difference without any reference to norms of what would be a reasonable settlement seems naïve.²⁸ Nor does the evidence suggest that arbitration has a substantial independent effect on actual outcomes – although unionization itself does tend to raise pay. The important point for public policy is that there is more than one model of interest arbitration available. Whether mandated by law or chosen voluntarily by the parties, policy makers or the parties can pick the version with which they are most comfortable.

The issue of a conflict between interest arbitration and governmental sovereignty is sometimes raised. (Curiously, such concerns are not often raised with regards to rights arbitration.) Essentially, the argument is that a sovereign government authority cannot cede its responsibilities to a private or outside party. Thus, if arbitrators were to decide on particular pay rates for public employees, they would be taking on the role that should belong to a legislative body such as a city council. In part, the binding-nonbinding arbitration format described below addresses the sovereignty issue by allowing a legislative veto.

Impasse Resolution in California

In California, with the exception of protective service workers, there is no mandatory system of imposing a settlement by arbitration. Mediation is available and is encouraged. However, unlike an arbitrator, a mediator does not make a decision. A mediator is basically a facilitator. California has a State Mediation and Conciliation Service, a counterpart to the Federal Mediation and Conciliation Service, which can provide mediators at no cost to the parties.²⁹ Over the years, there have been suggestions for more elaborate impasse procedures in California. In 1973, for example, the Legislature considered a proposal whereby fact-finding with a suggested resolution would be imposed and – if a work stoppage nonetheless ensued – a court could under specified conditions convert the suggestion into a mandated settlement. However, the Legislature has generally been averse to imposed settlements for most public workers and the 1973 proposals were not adopted.³⁰

Once an impasse is reached in a California public-sector interest dispute – an outcome that could occur even when mediation is used – the management side is free to impose its final offer. And workers are generally free to strike. As in the private sector, there are legal issues surrounding the definition of an “impasse” and in determining whether the parties have bargained in “good faith.” Thus, PERB – and even the courts – might become involved in an unresolved interest dispute.³¹

Fact-finding is another procedure that can be used in the event of impasses.³² Under the Rodda Act and under HEERA, for example, a fact-finding panel must be used

if the mediator so recommends and at least one of the two parties agrees. Fact-finding by a neutral third party can vary from preparation of a simple and neutral report outlining the positions of both sides to an advisory recommendation of an appropriate settlement. However, both sides would have to agree to such a fact-finder's recommendation; it is in no sense a binding decision. And in the case of transit impasses, fact-finding is confined by law to a descriptive report – just the “facts” – with no recommendation. Although fact-finding procedures may delay the process, labor relations experts generally have not viewed such procedures as particularly effective in resolving labor disputes.

Unionization in California's Public Sector

As Figure 1 shows, the proportion of wage and salary workers represented by unions has been falling nationally and in California. However, the California proportion of union-represented workers has tended to be higher than the national average.³³ This discrepancy, as can be seen on Table 1, is largely a public-sector phenomenon. The California union-representation rate for private-sector workers is somewhat higher than the national average. But it is still true that roughly one in ten wage and salary workers is union-represented in the U.S. and in California. In contrast, in California's public sector, almost six in ten are union-represented compared with about four in ten nationally.

Because private unionization has been declining but public unionization has been roughly constant for many years, the proportion of public workers in the total workforce represented by unions has been growing. At present, about half of unionized workers are in fact government employees in California. Some of these workers are employed by the federal government, especially in the Postal Service. But the vast majority is employed by state and local governments, mainly in the latter. As Table 1 shows, in those California metropolitan areas for which data are available, the public unionization rate is generally in the 50-60% range (and somewhat higher in the Sacramento area for obvious reasons). Table 1 also shows that there has been little trend in California's public-sector unionization rate over the past two decades, although private unionization has declined.

The U.S. Bureau of Labor Statistics (BLS) maintains an online file of union contracts covering 1,000 or more workers.³⁴ Figures 2 and 3, drawn from that file, provide a sectoral and union breakdown of public-sector union-represented workers. Almost half of the workers under these “major” contracts fall into a general civil service category. However, about a fourth are in school districts and another 14% are in higher education. Thus, educational represents an important sector of unionization. Protective service workers (police, corrections, fire) account for under one tenth of public union workers under major contracts. Transit workers account for only two percent.

Within the “major” contracts covering California's public sector, the Service Employees International Union (SEIU) has the largest worker coverage. SEIU is a hybrid union with both public and private workers. In the private sector, it is known for its “Justice for Janitors” campaign which unionized many private building service workers in the 1990s, bucking the more general trend of falling private-sector unionization. SEIU also represents many health care workers in the private sector. In recent years, SEIU has developed a reputation for innovative bargaining and organizing

techniques. It has been able to call on friendly elected officials for support in its public- and private-sector activities. There are probably about 600,000 workers in California represented by SEIU.³⁵

The California umbrella organization for the National Education Association (NEA), the California Teachers Association (CTA), is the most prominent teachers' union in the state. As a result of various ballot initiatives, a substantial amount of school district funding comes from Sacramento. Thus, CTA has seen it in its interest to be very active in state as well as local politics. The union represents about 300,000 workers in California.³⁶

Changes in criminal sentencing laws (including "three strikes") led to a substantial growth of the California prison population. Coincident with that increase has been the significant influence of the California Correctional Peace Officers Association (CCPOA). While all the important public sector unions are active in politics – particularly Democratic politics – the operations of the CCPOA have been more controversial than most. Partly because of the union's success in raising pay of the workers it represents in the face of California's ongoing budget crisis, some prominent legislative Democrats have come into conflict with CCPOA. CCPOA has a membership estimated at 31,000.³⁷

Of course, unions that operate mainly in the private sector also have an interest in state and local politics. For example, construction unions must be concerned with issues such as building codes, zoning, and planning policies, since these affect job prospects for those workers they represent. And there are many employers with interests in state and local politics, since government purchasing contracts, regulations, and tax policies can affect their welfare, apart from the specific area of employment and labor relations. In short, there is no shortage of interest groups – apart from unions – that are active in state and local politics in California.

Strikes in California's Public Sector

Most work stoppages in California occur in the private sector. Two prominent recent private disputes include a strike and lockout involving supermarkets in Southern California that went on for several months in 2003-04, and a lockout in longshoring that affected West Coast ports in 2002. There has been considerable union activity in the private hospital sector in recent years, particularly in the nursing field, that has led to strikes in various parts of the state. But since, as noted earlier, California does not have a ban on most public sector strikes, such work stoppages do occur from time to time.

Table 2 provides a listing of "major" California public sector strikes during 1982-2003.³⁸ Twenty-six strikes are listed, i.e., a little over one per year in that period. Many were of short duration; twelve lasted only 1 or 2 days. But eight lasted a week or more. Of course, the degree of disruption and public inconvenience is not only a function of the length of the dispute. Technology is also important. In the case, for example, of a strike at a municipal electrical utility, power continues to flow to customers during the work stoppage. On the other hand, a strike at a transit system usually halts service.

Where the public sector differs from private employment is in the ability of those who rely on the service to find substitutes. In many cases, ready substitutes for government services are not available. If public school teachers don't teach, students cannot instantly transfer to private schools, even if their parents could afford private tuition. Fourteen strikes on Table 2 involved K-12 school systems. Transit systems pose similar problems. If public transportation is halted, riders must utilize taxis (expensive), or use personal cars (which may not be available), or walk long distances. Transit-dependent persons may be unable to go to work, school, health care, or may do so only with great difficulty. Five of the strikes on Table 3 involve public transit.³⁹

In the private sector when strikes occur, there are costs to strikers (lost wages) and employers (lost profits), apart from inconvenience and cost to the general public. Since there are costs to both sides of the dispute, both parties have an incentive to avoid a work stoppage and to settle without one. Most interest disputes are indeed settled without strikes or lockouts. But from time to time, one occurs despite the disincentives. There is a research literature that attempts to model strikes and to determine their causes. But that literature is generally based on the private sector.

For public sector disputes, the issue is complicated by the fact that the management side may not lose "profits" in the event of a stoppage, since many public services are provided without charge to users, e.g., K-12 schools. Thus, from the management perspective, the incentive to avoid a public-sector work stoppage comes instead through the political mechanism. A disgruntled public might focus its anger on those elected officials who it sees as responsible for providing continuous service.

The public anger factor also differentiates public from private work stoppages in another way related to the above-mentioned substitution issue. When private-sector strikes occur, substitutes for private consumers are most often available. If Ford is on strike, cars can be bought from GM or some other firm. There are exceptions; railroad strikes and longshore strikes have such a widespread effect on freight movement and on all the firms that rely on freight delivery that government officials feel immediate pressure to intervene. But generally in the case of private work stoppages, government intervention is limited to expressions of concern by elected officials and offers of mediation from the FMCS.

Finally, a unique factor in the public sector is that unions play a role in state and local politics and may have some direct influence on the election of public officials. In contrast, private-sector unions rarely have a say on who their management counterparts will be.⁴⁰ Thus, public-sector bargaining sometimes involves both formal negotiations between union and management representatives while at another level bargaining is going on between the union and political leaders. Political leaders did play a role in the Los Angeles transit dispute described more fully below.

Nonbinding Arbitration and the 2003 Los Angeles Transit Strike⁴¹

In 2003, a strike of mechanics represented by Amalgamated Transit Union (ATU), Local 1277, brought a halt to bus and rail services operated by the Los Angeles County Metropolitan Transportation Authority for 35 days.⁴² Local 1277 represented 2,008 workers as of summer 2004 out of a total of 9,173 employees (7,793 union-represented) at the LACMTA, according to official data.

Other unions at LACMTA are the United Transportation Union (UTU) representing 4,460 bus drivers and rail operators, the Transportation Communications Union (TCU) representing 690 clerks, the American Federation of State, County and Municipal Employees (AFSCME) representing 560 supervisors, and the Teamsters representing 75 security guards. There are also 1,380 employees at LACMTA who are nonunion including managerial and professional personnel.⁴³ The fact that most workers at LACMTA are union-represented is typical of large urban transit agencies.

The Los Angeles County Metropolitan Transportation Authority

While most public transportation in Los Angeles County is provided by LACMTA, there are in addition various independent municipal transit operators including services provided by Long Beach, Santa Monica, and the City of Los Angeles Department of Transportation.⁴⁴ These municipal operators receive funding from LACMTA to support their services. During the strike, the lines of these other operators continued to function. But many transit users either depend entirely on LACMTA services or use the other operators simply as connections to LACMTA routes. Precise and consistent figures on the number of riders affected by the strike seem not to be available, but numbers upwards of 400,000 were frequently mentioned.⁴⁵

In addition to buses, light and heavy rail systems have been operating in Los Angeles since 1990. LACMTA's most recent light rail – the Gold Line connecting downtown Los Angeles with the Pasadena area – was put into operation shortly before the 2003 strike. However, rail accounts for under a tenth of its total service measured by vehicle revenue hours. The bulk of its services are provided by bus lines. LACMTA has a \$2.86 billion budget in fiscal year 2005. About 40% of its budget expenditures are attributed to its own bus operations with the figure rising close to one half including payments to independent municipal operators and for paratransit for the disabled. About a fifth of LACMTA's budget goes to rail, including the commuter "Metrolink" service which operates on railroad right-of-ways.⁴⁶ The issue of bus vs. rail has been contentious for many years and the subject of ongoing litigation.

Passenger fares cover less than 30% of LACMTA's transit operating expenditures, excluding debt service on its capital projects. Hence, its transit operations are highly subsidized. Local sales tax receipts account for over half of its revenue with the rest coming from state and federal grants, funds raised by bond issues for capital investments, and a variety of miscellaneous sources. In addition, as a government entity,

LACMTA is exempt from various taxes and can issue bonds receiving favorable tax treatment.

LACMTA is controlled by a Board of Directors consisting of thirteen voting members and an ex-officio nonvoting member appointed by the Governor. The thirteen voting members include the five Los Angeles County supervisors, the Mayor of Los Angeles and three members appointed by the Mayor, and four members appointed by other cities in the County. At the time of the strike, the Board was chaired by Zev Yaroslavsky, one of the five County supervisors.

As a transit employer, LACMTA is dwarfed by the New York City-area MTA that has about 64,000 employees. However, within California, LACMTA is quite large. The Bay Area's BART rail system has about 3,000 workers, San Francisco's "Muni" has about 3,800, and AC Transit which serves Alameda-Contra Costa has 2,300. Other transit operations in LA County are much smaller than LACMTA. For example, the Santa Monica Big Blue Bus system employs about 400 workers.

Public Transit in Los Angeles

As in many other urban jurisdictions, transit operations in the Los Angeles area were originally privately owned.⁴⁷ Such operations began as local steam railways and horse cars in the 19th century, then evolved into electric streetcar systems (trolley cars that are now termed "light rail"). The streetcar systems in part served as instruments for real-estate development. Once a line was brought to outlying property, that property became valuable for homes and businesses. By the 1920s, Los Angeles had an extensive streetcar system extending throughout southern California, not just Los Angeles County. The system even included a subway through which the streetcars passed in the downtown area. Much of the streetcar system, however, ran on local streets and thus was progressively caught in congested traffic. Bus systems began by the 1920s and eventually replaced the streetcars, particularly in the 1940s and 1950s, but with the last few cars running until 1963.

Although transit systems in Los Angeles were largely private until the 1950s, they were always enmeshed in local politics. The operators of transit systems had to obtain a franchise from public authorities to run on local streets. Thus, fares and service quality were subject to ultimate review by elected officials. In southern California, especially beginning in the 1940s, transportation policy tilted toward freeways and the private automobile. Transit systems became money-losing operations and were taken over by public entities. The Los Angeles Metropolitan Transit Authority (LAMTA) was created by the state Legislature in the early 1950s, although it did not take over the major private bus and streetcar system until 1958.

This first "MTA" was in turn absorbed into the Southern California Rapid Transit District (SCRTD) in 1964, another state-created agency. It also took over other private and public municipal transit lines and served counties surrounding Los Angeles as well as Los Angeles County itself. However, in 1973, the surrounding counties took over their own services through separate agencies. From 1975 until 1993, SCRTD operated in

parallel with another state-created entity, the Los Angeles County Transportation Commission, which was charged with oversight of public transit and the highway system. The Commission undertook construction of the initial light rail and subway lines. In 1993, the Commission and the SCRTD were merged into the present LACMTA by the Legislature.

In 2000, 6.6% of commuters used public transportation in Los Angeles County, according to Census data. It appears from earlier data that the transit-using percentage dropped in the 1980s, and held about steady in the 1990s.⁴⁸ For such travelers, a work stoppage is a major inconvenience. However, the percentage is small enough that a halt in transit service does not create an immediate crisis, as it would in, say, New York City or even in the Bay Area. Thus, the cost of a work stoppage – and the incentive to intervene quickly – is lower for Los Angeles-area political figures than in more transit-dependent jurisdictions. However, to the extent that a strike leads commuters to perceive and avoid public transit as potentially unreliable, the disruption adversely affects the goal of raising the transit-using proportion of commuters.

Strike Issues and Personalities

While negotiations between ATU Local 1277 and LACMTA covered an array of issues such as pay and pensions, the health care program was the major center of disagreement. Other labor disputes in California and around the country were taking place over the issue of health care, including the contemporaneous grocery strike in southern California. The aggravating factor across these disputes was the rapid increase in health insurance costs.

For many years, national health care costs had been rising more rapidly than the general rate of inflation until the mid-1990s, when various forms of “managed care” reversed the trend temporarily. However, there was widespread public discontent with the rationing that managed care entailed, and the savings seemed to dissipate after a few years. By 2003, many nonunion employers were shifting health care costs toward employees through co-payments, deductibles, and direct employee contributions. In the union sector, demands by employers for similar concessions led to impasses.

In the ATU-LACMTA case, the issue was additionally complicated by the form in which health care had been provided to workers in the past. In the private sector, health benefits are often negotiated by unions and then left to employers to provide, usually through an insurance carrier selected and monitored by the employer. An alternative arrangement is to create a separate trust with equal representation from union and management to administer the plan. In this situation, however, ATU Local 1277 operated a health and welfare fund to which the LACMTA contributed. That fund, in turn, provided workers with a choice of three health plans plus dental and vision-care coverage. LACMTA had a single representative on the board of the fund but the union had five. Management spokespersons argued that the agency could more effectively administer this fund than could the union. Thus, the dispute was partly about cost sharing of health plan expenses with workers and partly about the administration of the plan.

While the circumstances of the dispute might have led to a strike whatever the past history of labor relations between the parties, in this case, the history was not one of a smooth labor-management relationship. Table 3 shows the history of transit work stoppages at LACMTA and its predecessor agencies. During the period 1960-2000, there were nine strikes. Since the LACMTA had been created, there had been strikes in two of the three contract rounds. Most observers felt that the climate of union-management relations was poor.

Public statements by the two sides before and during the 2003 strike were not friendly. ATU Local 1277 president Neil Silver accused the LACMTA of having “perfected the arts of hypocrisy and divisiveness.” Silver was first elected president in 1987, but was out-of-office during 1991-94. The MTA Board chair at the time of the dispute was County Supervisor Zev Yaroslavsky. He asserted that the strike was the product of Silver’s political problems within his local.⁴⁹ These statements – and others like them – did not foster resolution, although it is impossible to say whether the strike would have been shorter without a lower volume of rhetoric.

In terms of the public relations battle, Silver probably came out behind. He was characterized in the press as an old-line labor leader, with the implication that he was someone who was especially adversarial. Silver was re-elected local president after the strike with 56% of the vote.⁵⁰ On the other hand, LACMTA as an institution suffers from an image tied to various managerial deficiencies related to subway construction, including a highly-publicized sinkhole that opened up on Hollywood Boulevard. That poor image led to a ban on further sales tax funding of subway construction absent a vote of the county electorate.⁵¹

Early on in the negotiations, the LACMTA offered a 1-year contract and a wage increase of about 2.2% along with a reported offer of a 16% increase in contributions to the health plan that was experiencing financial pressures. Although this proposal was termed a final offer, there were in fact various “final” offers as the negotiations and strike unfolded. The union pushed for a long-term contract of five or six years with a sufficient increase in contributions to the health plan to keep it afloat for that period. At one point, the union sought – but did not obtain – state legislation that would have mandated such contributions.

As negotiations continued, it appeared that a contract duration of more than one year became part of the LACMTA’s offer, but with control of the health fund a continuing source of discord. There was also a complicating factor in the political management of LACMTA. Normally, all 13 LACMTA board members would play some role in the overseeing of negotiations, since ultimately the board must approve any collective bargaining agreement. But four of the board members were initially barred from taking part on grounds that they had received past political contributions from ATU 1277 and thus had a conflict of interest. These were County Supervisor Gloria Molina, L.A. Mayor James Hahn, and L.A. City Council members Martin Ludlow and Antonio Villaraigosa. As a result, decision making was in the hands of the remaining nine members who were determined to take a hard line on the health plan issue.

The strike began on October 14, 2003. Negotiation sessions were conducted under the auspices of the State Mediation and Conciliation Service. Exactly what the offers and counteroffers were is not known, and the parties tended to relate varying versions of the status of the talks. However, during this period, LACMTA came to accept a plan of 50-50 representation on the board of the health plan rather than complete control. On October 27, the CEO of the LACMTA stated that the parties were at a legal impasse. In the private sector, such a position by management sometimes implies that management will impose its final offer and, if necessary, operate with replacement workers. But that approach did not seem to be part of LACMTA's strategy and would have been difficult to implement since UTU drivers were supporting the ATU strike and were not willing to work.

At the end of October, ATU offered to return to work if the dispute was submitted to binding arbitration. That approach was rejected by the LACMTA. One interpretation of the aversion by LACMTA management to binding arbitration was that in non-labor areas, the agency had been forced by outside parties through litigation to purchase buses and to meet certain service standards.⁵² Hence, the idea of another third party setting labor policy was anathema. And there was also the above-mentioned sovereignty issue that often arises in government.

As a route to settling the dispute, and yet take account of LACMTA objections to a binding arbitration approach, the authors of this chapter proposed an alternative, binding-nonbinding arbitration option in a *Los Angeles Times* op ed piece. Under this plan, that was later endorsed by a *Times* editorial, the two parties would submit their proposals to an arbitration process. A decision would then be rendered, but either side could reject it by a supermajority vote. LACMTA initially demanded that the union's membership vote on its final offer. The result was an overwhelming rejection on November 7. At the same time, a court decision permitted the four LACMTA board members who earlier had been barred on conflict of interest grounds to become part of the management decision process. Councilman Villaraigosa played a mediating role between Silver and Yaroslavsky to the point, he said, that he thought they might "start exchanging recipes for matzo ball soup." Both sides agreed to end the strike with terms for all matters except the health plan and to use binding-nonbinding arbitration to resolve the health plan issue. Thus, binding-nonbinding arbitration provided a route to end the strike after 35 days.⁵³

The Use of Binding-Nonbinding Arbitration

California has an impasse procedure for transit disputes, albeit a rather ineffective one. Under the Public Transportation Labor Disputes Act, either party to a dispute can request gubernatorial intervention. It is then up to the Governor to determine if a strike or lockout would "significantly disrupt public transportation services and endanger the public's health, safety, or welfare." If so, the Governor can appoint a fact-finding board to prepare a report within seven days. However, the board's report is expressly confined to stating the parties' positions. It cannot include a suggested settlement. Once the report is prepared, the Governor can obtain a 60-day injunction barring a strike or lockout.⁵⁴

Given this very limited form of fact-finding, it is not surprising that the main impact of this procedure is the 60-day delay. It appears that the Legislature – stimulated by earlier transit work stoppages in Los Angeles and the Bay Area – did originally consider imposing (final-offer) arbitration on the parties as an option. But transit management and labor both opposed the idea and it was dropped from the bill. Given the opposition, only the more limited approach was adopted.⁵⁵

Fact-finding with an injunction has a superficial similarity to procedures under the Taft-Hartley Act mentioned earlier. Under those procedures, the President can obtain an injunction – 80 days in that case – for national emergency disputes within the private sector. However, fact-finding under Taft-Hartley takes place during the injunction period – not before – and the fact-finders are not so tightly constrained as under the process for California public transit. Moreover, there is a provision under Taft-Hartley for a vote by workers on management’s “final offer.”

Despite the absence of anything more than the weak fact-finding approach in California law, the parties were free to agree voluntarily to a settlement mechanism on their own in the ATU-LACMTA dispute. The binding-nonbinding arbitration scheme they eventually adopted involved the creation of a panel of arbitrators, one from ATU, one from LACMTA, and one neutral. The neutral selected was a retired federal judge, H. Lee Sarokin. Under the agreed procedure, Judge Sarokin first tried to mediate a settlement. When a deal could not be reached in that manner, he held formal hearings in April 2004. The parties submitted briefs shortly thereafter. And the panel issued a decision at the beginning of June. Under the terms of the settlement, either party could have rejected the decision by a two-thirds vote of their boards, but neither did so and the decision became part of the contract, which now extends to 2006.

The arbitration decision maintained the health and welfare fund but restructured its board of directors to include three ATU directors, three LACMTA directors, and a neutral director who could break tie votes, if necessary. It designated rates of contributions to the fund by LACMTA for the life of the contract and limited the obligation of LACMTA to that level of contributions. Thus a deficit of revenue relative to fund expenses would have to be made up either by employee and retiree contributions or by benefit reductions. The fund's board of directors was required to give the LACMTA the right to provide all administrative services to the fund at no cost to the fund. After a reasonable period of time, the board of directors could evaluate the quality of LACMTA’s administrative services and determine if LACMTA should continue to provide them.

General Lessons for California Concerning Binding-Nonbinding Arbitration

Perhaps the most obvious lesson from the transit strike of 2003 was that a binding-nonbinding arbitration arrangement could and did lead to an end of the work stoppage, thus restoring bus and rail service to stranded riders. The procedure avoided the sovereignty issue since LACMTA could have rejected the arbitration decision.

Although the sovereignty issue does not arise on the union side, nonetheless ATU retained the right to reject the arbitration decision if it had been totally unacceptable.

It is important to note that both sides were involved in the design of the binding-nonbinding process. Issues that they determined included the level of the supermajority vote that would have been needed to reject the award, the method of choosing arbitrators and the size and composition of the arbitration panel, and the type of arbitration (conventional vs. final-offer). They also chose to settle the non-health issues through negotiations and to use the arbitration process only for issues surrounding the health fund. The settlement provided some guidelines for the arbitration panel to consider in making a decision. But the process also left open the possibility that the neutral arbitrator might instead mediate a resolution, although that did not occur in this particular dispute.

Also important to note is that nothing prevents the parties to a labor negotiation from agreeing voluntarily to a binding-nonbinding arbitration process *before* bargaining begins. If that were done, the danger that a work stoppage would occur would be substantially diminished. Whether the parties to the ATU-LACMTA dispute will ultimately view their binding-nonbinding arbitration procedure as a success will depend on how the revised health plan issue plays out during the current contract. A successful outcome might produce greater willingness to consider the procedure in the future, both by the immediate parties to the 2003 dispute and by others in the public sector.

There remains the question of whether California's current impasse procedures should include binding-nonbinding arbitration as a mandate. In 2000, the Legislature enacted SB 402 that required binding arbitration for local police and fire disputes at the request of the affected union. (Recall that these protective service workers are expressly forbidden to strike, unlike most other public-sector workers in the state.) However, the sovereignty issue arose when this law was tested in the courts and it was declared unconstitutional by the California Supreme Court in 2003.⁵⁶ The Legislature then enacted a modified version of the law – SB 440 – containing the possibility of supermajority rejection by the public employer. In this case, the supermajority required for rejection was a unanimous vote, a level more demanding than the two-thirds hurdle utilized in the ATU-LACMTA case. Whether some future court case testing SB 440 will eventually determine that the unanimous supermajority level is too high is unknown at this writing. (Governor Schwarzenegger vetoed an extension of this legislation to certain state-employed firefighters under AB 1362 in September 2004.)

While there are limits on the kinds of interest arbitration procedures the state may impose on local governments in California, local governments can themselves adopt such procedures on their own. Several Bay Area cities have adopted binding interest arbitration in the case of protective service workers. From time to time, binding arbitration has been placed on local ballots as an initiative. If local governments (or local voters) can adopt binding arbitration, they could certainly adopt the less stringent binding-nonbinding approach used in the ATU-LACMTA dispute.⁵⁷

One area where a limited form compulsory decision making has been imposed in California is under certain Indian gambling compacts. The Indian tribes operating casinos and hotels on their reservations have certain sovereign powers and so are exempt from the federal amended Wagner Act. Thus, employees of these operations do not have protected rights to collective bargaining. However, the tribes need to reach compacts with the state in order to create their casinos and the state can include labor regulations as part of the agreement. Recent compacts have included provisions providing protections similar to the amended Wagner Act, but banning strikes and substituting final decision authority by a “tribal forum” as a dispute-resolution procedure.⁵⁸

In the protective worker and Indian gambling cases, the rationale for using some form of mandated decision process appears to be the ban on strikes as an option for resolving impasses. But most California public-sector workers, including transit workers, do have a *de facto* right to strike. Fact-finding, especially in the extremely limited form prescribed for transit disputes, contributes little to dispute resolution. The binding-nonbinding arbitration approach, in contrast, might be helpful and deals directly with the issue of governmental sovereignty.

Conclusion

Public-sector collective bargaining in California is regulated under various state laws. Many provisions of those laws were copied from earlier federal legislation and might be revisited simply on that account. Most California public workers are not banned from striking. And for most of the public sector, the impasse procedures outlined in state law do not necessarily lead to a resolution of the dispute without a strike. A major strike of Los Angeles-area transit workers in 2003 was eventually settled voluntarily by binding-nonbinding arbitration. Under that procedure, an arbitration decision is made with the right of either side to reject the decision by a supermajority vote. In the 2003 transit case, the process was adopted voluntarily. A rather strict mandatory version of binding-nonbinding arbitration now covers protective service workers in California, although its constitutionality may yet be tested through litigation.

The binding-nonbinding arbitration approach is certainly something the parties should consider adopting voluntarily as a method of resolving impasses. California’s State Mediation and Conciliation Service could encourage its use. At present, however, the Legislature seems reluctant to consider any process of settling a labor dispute other than by mediation – certainly a useful technique – and delay via fact-finding. Fact-finding does not appear to be particularly helpful in resolving disputes. An exception in state law is made only when strikes are banned – a limitation applying only to a relatively small portion of the public-sector workforce. It is time for California to consider a wider range of options including binding-nonbinding arbitration.

Table 1: Union Coverage of Wage and Salary Workers: 1983-2003

	2003	1983
All States:		
Private Sector	9.0%	18.5%
Public Sector	41.5%	45.5%
California Statewide:		
Private Sector	10.7%	19.7%
Public Sector	58.1%	57.2%
California Metropolitan Areas:		
Bakersfield		
Private Sector	9.6%	n.a.
Public Sector	55.8%	n.a.
Fresno		
Private Sector	5.6%	n.a.
Public Sector	50.1%	n.a.
Los Angeles-Riverside-Orange County		
Private Sector	10.4%	n.a.
Public Sector	58.9%	n.a.
Sacramento-Yolo		
Private Sector	11.3%	n.a.
Public Sector	66.9%	n.a.
San Diego		
Private Sector	9.1%	n.a.
Public Sector	57.8%	n.a.
San Francisco-Oakland-San Jose		
Private Sector	11.7%	n.a.
Public Sector	58.7%	n.a.

Source: Barry T. Hirsch and David A. Macpherson, *Union Membership and Earnings Data Book, 2004 Edition* (Washington: Bureau of National Affairs, 2004); Barry T. Hirsch and David A. Macpherson, *Union Membership and Earnings Data Book 1993: Compilations from the Current Population Survey* (Washington: Bureau of National Affairs, 1994).

Table 2: Major Work Stoppages in the Public Sector: California, 1982-2003

Southern Calif. Rapid Transit District
UTU
9/14/82-9/19/82
4,600 workers

Los Angeles Schools
AFT and NEA
9/16/83-9/16/82
12,400 workers

Oakland Schools
NEA
1/6/86-1/31/86
2,300 workers

Los Angeles Schools
NEA
2/5/87-2/6/87
26,000 workers

Los Angeles Schools
UTLA (AFT and NEA affiliate)
5/15/89-5/25/89
27,000 workers

Sacramento Schools
AFT
9/5/89-9/19/89
2,400 workers

Stockton Schools
NEA
1/2/90-1/12/90
1,300 workers

Fremont Schools
NEA
3/2/90-3/2/90
1,700 workers

Vallejo Schools
NEA

4/16/93-4/17/93
1,000 workers

Los Angeles Dept. of Water and Power
IBEW and Engineers & Architects
9/1/93-9/9/93
9,000 workers

Los Angeles Metropolitan
Transportation Authority
UTU
7/25/94-8/2/94
7,200 workers

UCLA Student Assistants
UAW
4/26/95-4/27/95
3,000 workers

Oakland Schools
NEA
11/28/95-11/29/95
3,500 workers

Oakland Schools
NEA
1/30/95-1/30/95
3,500 workers

San Diego Schools
NEA
2/1/96-2/8/96
5,000 workers

Oakland Schools
NEA
2/15/96-3/20/96
3,500 workers

Compton Schools
NEA
6/10/96-6/10/96
1,100 workers

Contra Costa Schools
Multi-union

6/26/96-6/26/96

4,100 workers

Bay Area Rapid Transit

ATU, AFSCME

9/7/97-9/13/97

2,600 workers

Los Angeles County

SEIU

9/30/97-10/2/97

2,200 workers

University of California

CWA

12/1/98-12/6/98

9,000 workers (1,200 with bargaining rights)

University of California

UAW

4/18/00-4/18/00

5,000 workers

Los Angeles Metropolitan

Transportation Authority

UTU, ATU, TCU

9/16/00-10/17/00

7,400 workers

Los Angeles County

SEIU

10/11/00-10/11/00

47,000 workers

San Joaquin County

SEIU

8/4/03-8/8/03

5,000 workers

Los Angeles Metropolitan

Transportation Authority

ATU

10/14/03-11/17/03

6,200 workers

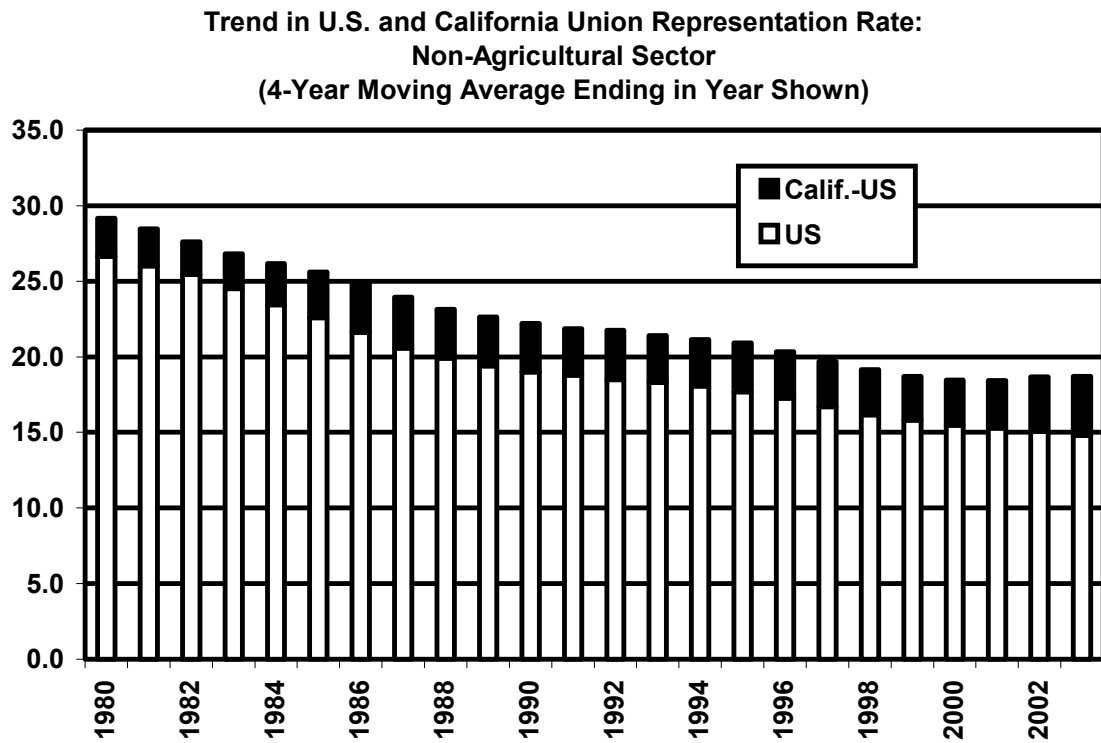
Source: U.S. Bureau of Labor Statistics

Table 3: Strikes at the Los Angeles Metropolitan Transit Authority - LAMTA (1958-1964), Southern California Rapid Transit District - SCRTD (1964-1993) and Los Angeles County Metropolitan Transportation Authority – LACMTA (1993-Present):

- 1) 11/16/60 to 11/20/60 - LAMTA struck by Brotherhood of Railway Trainmen - BRT (now United Transportation Union - UTU), resumed working 11/21/60. 5 days.
- 2) 6/14/64 to 6/21/64 LAMTA struck by BRT (now-UTU), resumed working 6/22/64. 8 days.
- 3) 2/28/72 to 3/4/72 SCRTD struck by Amalgamated Transit Union - ATU, resumed working 3/5/72. 6 days.
- 4) 8/12/74 to 10/18/74 SCRTD struck by UTU, resumed working 10/19/74. 66 days.
- 5) 8/23/76 to 9/27/76 SCRTD struck by ATU, resumed working 9/28/76. 36 days.
- 6) 8/26/79 to 9/17/79 SCRTD struck by ATU and Brotherhood of Railway, Airline, Steamship Clerks, Freight Handlers, Express and Station Employees - BRAC (now Transportation Communications Union - TCU), resumed working 9/18/79. 23 days.
- 7) 9/15/82 to 9/19/82 SCRTD struck by UTU, resumed working 9/20/82. 5 days.
- 8) 7/23/94 to 8/3/94 LACMTA struck by UTU, 12 days.
- 9) 9/16/00 to 10/17/00 LACMTA struck by UTU, ATU & TCU. 33 days.
- 10) 10/14/03 to 11/17/03 LACMTA struck by ATU, 35 days.

Source: Prepared with the assistance of Glenda Mariner at the MTA's Dorothy Peyton Library.

Figure 1:



Source: Data from Current Population Survey available at www.unionstats.com.

Figure 2:

Source: Online files at U.S. Bureau of Labor Statistics.

**California Workers Under Major Union Contracts by Sector:
State and Local Government**

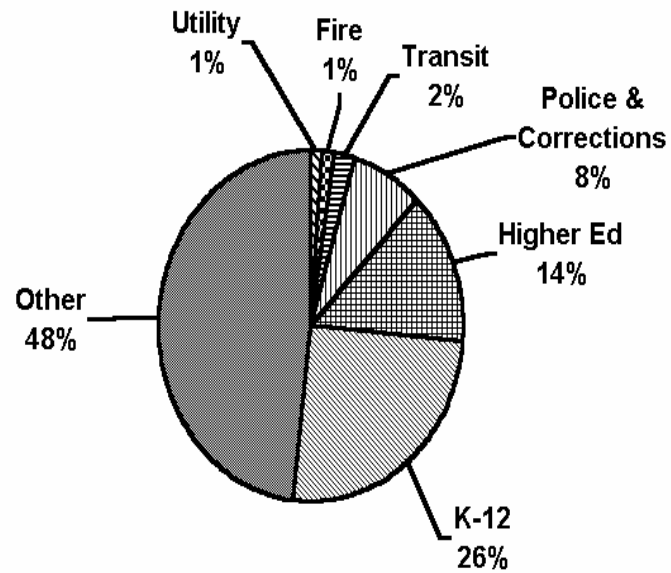
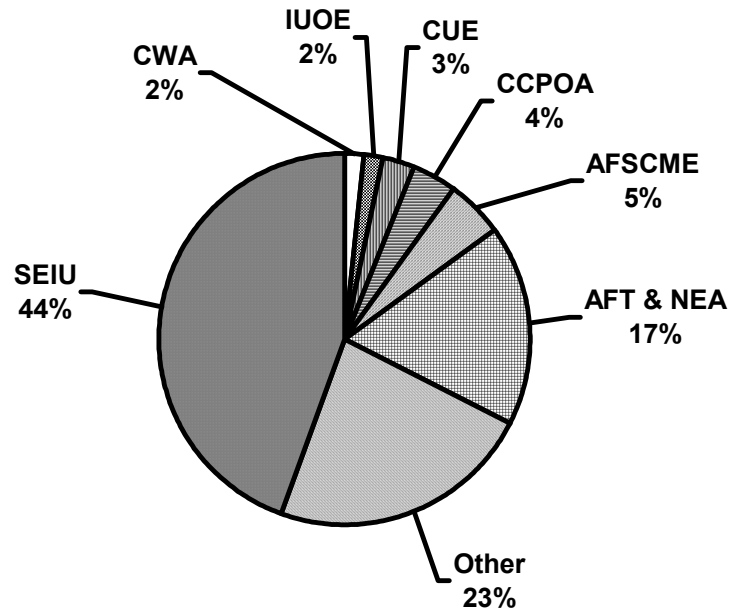


Figure 3:

**California Workers Covered by Major Union Contracts by
Labor Organization: State & Local Government**



AFT = American Federation of Teachers*

AFSCME = American Federation of State, County, and Municipal Employees*

CCPOA = California Correctional Peace Officers Association**

CUE = Coalition of University Employees***

CWA = Communication Workers of America*

IUOE = International Union of Operating Engineers*

SEIU = Service Employees International Union*

*AFL-CIO affiliate.

**Independent union representing state prison guards.

***Independent union representing clerical workers at University of California.

Source: Online files at U.S. Bureau of Labor Statistics.

Endnotes

¹ California adopted its Agricultural Labor Relations Act in 1975 in response to activities of Cesar Chavez and the United Farm Workers. Because this chapter focuses on the public sector, we do not pursue the state's policies in farm labor relations further below. For more information, go to www.alrb.ca.gov.

² Some tribal compacts (including labor provisions) can be found on the Governor's webpage as part of press releases announcing various agreements. See www.governor.ca.gov.

³ In general terms, an appropriate bargaining unit is one in which the NLRB finds a common interest among the workers. It could involve a single craft (e.g., nurses), a plant or work unit within a firm, or all non-supervisory workers within a multi-plant or multi-unit firm. In some cases, the unit may involve multiple employers within the same industry. In the original Wagner Act, the NLRB had very wide discretion in determining the unit. Later amendments narrowed the NLRB's discretion. Choice of a unit by the NLRB can affect the probability a union will win an election. That is, if the unit chosen contains many union supporters, the odds the union will win are increased. For more information on this legislation, go to www.nlr.gov.

⁴ Until that decision, the Supreme Court took a narrow view of Congressional authority to regulate "interstate commerce," limiting that authority largely to transportation of goods and people across state lines. Thus, a manufacturing plant would not have been subject to federal regulation. Most activities covered by the Wagner Act did not involve interstate transportation. Prior to 1937, the Court had invalidated various New Deal pieces of legislation, leading to a major political fight over the Roosevelt administration's ill-fated "court-packing" proposal to add new justices.

⁵ The original Railway Labor Act was passed in the 1920s and amended in the 1930s, including coverage of the then-embryonic airline industry. Because it regulated transportation across state lines, that Act did not raise the "interstate commerce" issue. For more information on this legislation, go to www.nmb.gov.

⁶ The enactment of Taft-Hartley over the veto of President Truman was controversial and a major issue in the 1948 presidential election.

⁷ This provision of Taft-Hartley was dormant for many years but was revived when President George W. Bush invoked it during a labor dispute at West Coast ports in 2002.

⁸ The FMCS also provides parties with lists of private arbitrators, primarily for use in what we define below as "rights" arbitration cases. For more information, go to www.fmcs.gov.

⁹ The NEA claims a total membership (both in California and elsewhere) of 2.7 million. Unlike many other unions, NEA does not belong to the AFL-CIO. The AFL-CIO affiliate for teachers, the American Federation of Teachers (AFT) claims a total membership of about 740,000. Source: Court Gifford, ed., *Directory of U.S. Labor Organizations*, 2003 Edition (Washington: Bureau of National Affairs, 2003). Although the two organizations are often rivals, in some instances they cooperate. For example, teachers in the Los Angeles schools are represented by United Teachers Los Angeles (UTLA), an affiliate of both NEA and AFT.

¹⁰ Unlike the NLRB, the FLRA contains within it the Federal Services Impasses Panel that can resolve impasses and even impose settlements where negotiations and mediation have failed. The NLRB, in contrast, does not resolve labor-management contract disputes. For more information on the federal system, go to www.flra.gov.

¹¹ Under the Taft-Hartley amendments to the Wagner Act, private supervisory employees lost the right to collective bargaining. They may engage in such bargaining but have no federally-protected right to do so. At the time, management was fearful that front-line supervisors who were unionized would not be on management's side in the event of a labor dispute. With regard to supervisory unionization in the public sector, see Adrienne E. Eaton and Paula B. Voos, "Wearing Two Hats: The Unionization of Public Sector Supervisors" in Jonathan Brock and David B. Lipsky, eds., *Going Public: The Role of Labor-Management Relations in Delivering Quality Government Services* (Champaign, IL: Industrial Relations Research Association, 2003), pp. 295-315.

¹² See Leo Troy, *The Twilight of the Old Unionism* (Armonk, NY: M.E. Sharpe, 2004).

¹³ The four statutes are analyzed in "pocket guides" available for each from the California Public Employee Relations (CPER) program located at the Institute of Industrial Relations, University of California-Berkeley. For further information on obtaining the guides, go to <http://cper.berkeley.edu>. The PERB website can be found at www.perb.ca.gov.

¹⁴ Under amendments to MMBA in 2000, workers represented by a union can be covered by an "agency shop" clause requiring non-member workers to pay a fee covering the costs of representation. (Members

already pay dues that cover such costs.) Such an arrangement can be put in place by a majority vote of workers in the bargaining unit (and can be removed by a similar vote). In contrast, in the private sector under the amended Wagner Act, unions can negotiate contract clauses requiring that employees become members (or pay a service fee) except in states that prohibit such clauses pursuant to state “right to work” laws. These private-sector arrangements are termed “union shops.”

¹⁵ Kenneth M. Jennings, Jr., Earle C. Traynham, Jr., and Jay A. Smith, Jr., “Labor Relations Activities in Transit Systems” in Jack Rabin, Thomas Vocino, W. Bartley Hildreth, and Gerald J. Miller, eds., *Handbook of Public Sector Labor Relations* (New York: Marcel Dekker, 1994), pp. 297-326. Congress was responding in part to a Florida situation in which collective bargaining rights were lost when a private system was taken over by a public authority. It considered an alternative, known as the “Memphis Model,” in which the public authority creates a private contractor to provide the service, thus preserving private collective bargaining protections. However, ultimately Congress did not impose a precise method of protecting such rights. See “Transit Labor Protections – A Guide to Section 13(c), Federal Transit Act,” Legal Research Digest, June 1995, no. 4, published by the Transit Cooperative Research Program under the sponsorship of the Federal Transit Administration. Available at www.tcponline.org.

¹⁶ When public transit operations become privately operated, they come under the amended Wagner Act. In that case, collective bargaining rights continue. However, Section 13(c) includes various job security protections and could be interpreted to continue various conditions of work under a collective bargaining agreement if one was in effect. Sixty percent of public operators did at least some contracting out of transit services in a recent survey. See Transportation Research Board, *Contracting for Bus and Demand-Responsive Transit Services: A Survey of U.S. Practice and Experience* (Washington: National Academy Press, 2001). Some contracting out may involve specialized van-type services for disabled riders rather than fixed bus routes. Measured in vehicle-revenue hours, about 15% of specialized and fixed-route services were found to be contracted out.

¹⁷ Such elections are conducted pursuant to Title 8 of the California Code of Regulations, Section 15800.

¹⁸ Such supervisory workers are covered by the Transit Employer-Employee Relations Act (TEERA). Tensions developed over supervisory workers at the LACMTA when the agency was formed. The LACMTA created a Public Transportation Services Corporation (PTSC) that employed certain employees who became part of the new agency, apparently related to the issue of coverage or non-coverage of those employees by Social Security vs. the state's CalPERS pension system. Litigation over the Social Security issue developed as a result. However, the precise genesis of TEERA is not clear. However, supervisory workers that are employed by the PTSC are covered by TEERA, along with other supervisors at the LACMTA.

¹⁹ The Winton Act of 1965 had earlier regulated school districts' labor relations.

²⁰ HEERA also covers the Hastings law school.

²¹ Amendments to HEERA and EERA in 2000 require union-represented workers who are not (dues-paying) members to pay a representation fee. In effect, the “agency shop” is the default position but workers can vote to remove the fee (or reinstate it) by majority vote. Under the Dills Act, a contract may contain a “maintenance of membership” clause requiring members to retain membership during the life of the contract or a fee arrangement.

²² Among other provisions, faculty who are members of the Senates are exempt from the fee arrangement described above.

²³ *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Association, Local 660, SEIU, AFL-CIO* (1985), 38 Cal. 3d 564.

²⁴ Apart from California, ten states allow strikes explicitly for state, school, and municipal employees (other than protective service), although some require advance notice or use of impasse procedures before a strike can occur. These are Colorado, Hawaii, Illinois, Louisiana, Minnesota, New Jersey, Ohio, Oregon, and Pennsylvania. Connecticut allows strikes of state and municipal employees but not school teachers. See John A. Fossum, *Labor Relations: Development, Structure, Process*, eighth edition (New York: McGraw Hill, 2002), pp. 509-513.

²⁵ A typical grievance provision sets forward a series of hierarchical steps under which union and management officials try and resolve the grievance by mutual agreement. Rights arbitration is used when the grievance steps have failed to produce a resolution.

²⁶ In some cases, an arbitration board consisting of a union-selected arbitrator, a management-selected arbitrator, and a neutral arbitrator is used for rights arbitration. The contract with the LACMTA whose expiration gave rise to the 2003 strike discussed below contains such an arrangement.

²⁷ It might be noted that in Major League Baseball, union and management have developed a final-offer arbitration system for settling disputes over salaries of certain star players. A variation on final-offer arbitration is to allow the arbitrator to make final-offer decisions on an item-by-item basis within the contract offers rather than have to decide on the entire package. Thus, while Connecticut school teacher interest disputes are subject to final-offer arbitration on the entire package, Iowa uses final-offer arbitration on an item-by-item basis. See Fossum, *ibid*.

²⁸ A review of the literature from the mid-1980s can be found in Ronald G. Ehrenberg and Joshua L. Schwarz, "Public Sector Labor Markets" in Orley C. Ashenfelter and Richard Layard, eds. *Handbook of Labor Economics*, vol. 2 (New York: North-Holland, 1986), pp. 1219-1268. An example of more recent empirical work is Orley Ashenfelter and Dean Hyslop, "Measuring the Effect of Arbitration on Wage Levels: The Case of Police Officers," National Bureau of Economic Research, working paper 7294 (1999).

²⁹ Like the FMCS, the SMCS also provides lists of private professional arbitrators that the parties can use for rights or interest disputes. For more information, go to www.dir.ca.gov/csmcs.html.

³⁰ See David A. Dilts and William J. Walsh, *Collective Bargaining and Impasse Resolution in the Public Sector* (New York: Quorum Books, 1988), pp. 168-170.

³¹ Failure to bargain in good faith is an unfair labor practice. A party that fails to bargain in good faith could be ordered back to the bargaining table by PERB or another authority, thus voiding any claim that an impasse had been reached.

³² The federal Taft-Hartley Act added a fact-finding procedure for national emergency disputes. Certain health care disputes under the amended Wagner Act are subject to fact-finding. The federal Railway Labor Act includes fact-finding for railroads and airlines.

³³ Data on the tables refer to the proportions of workers represented by unions. Some of these workers are not members but are employed in bargaining units.

³⁴ The agreements are available at <http://www.bls.gov/cba/cbaindex.htm>. This file is periodically updated.

³⁵ SEIU claims a total membership nationally of 1.4 million. The estimate for California was derived from data in Ruth Milkman and Daisy Rooks, "California Union Membership: A Turn-of-the-Century Portrait" in Ruth Milkman, ed., *The State of California Labor: 2003* (Berkeley: University of California Press, 2003), pp. 3-37. Although this source does not itemize members by union, Table 1.5 provides data on the number of organizers and the member-to-organizer ratio in various unions.

³⁶ See above for source of membership estimate. The rival American Federation of Teachers (AFT) probably has about 65,000 members in California. There may be some duplication in these figures because of the joint union affiliated with both AFT and NEA in Los Angeles. The joint union – United Teachers Los Angeles – claims a membership of about 43,000. Source: California Teachers Association, "UTLA Contract Addresses Challenges," *California Educator* (March 2001).

³⁷ Various sources cite this figure. See, for example, Andy Furillo, "State's Prisons May Escape a Court Takeover," *Sacramento Bee*, August 5, 2004.

³⁸ The work stoppage listing is drawn from various sources provided by the U.S. Bureau of Labor Statistics (BLS). BLS obtains much of its information from media accounts, which may not be entirely accurate. A "major" stoppage is one involving 1,000 or more workers.

³⁹ In addition, a brief "sickout" in March 2004 caused a partial disruption of service for one day at the Sacramento Regional Transit District. Roughly half of the 400 drivers employed by the District called in sick in a contract dispute.

⁴⁰ There are some limited exceptions in private employment. In a few cases of concession bargaining, unions have won some seats on corporate boards of directors in exchange for pay or other givebacks. In some cases, unions in such situations have acquired ownership interests in the firms at which they bargain. For example, prior to its bankruptcy filing, unions at United Airlines had a controlling interest in that firm.

⁴¹ This section derives heavily from Edmund D. Edelman and Daniel J.B. Mitchell, "Binding-Nonbinding Arbitration: A New Process to Resolve Interest Disputes," *California Public Employee Relations Journal*, No. 164 (February 2004), pp. 6-14.

⁴² ATU 1277 also represents workers at the Riverside Transit Authority and a private contractor that is utilized by that Authority (Transportation Concepts) as well as the SunLine Transit Agency in the Palm Springs area. The parent ATU has a total membership of 170,000 workers in the U.S. and Canada. It has

other locals in California at AC Transit in Alameda County, at the BART rail system in the Bay Area, at the Sacramento Regional Transit District, and at the Santa Clara Valley Transportation Authority. Although a precise figure is unavailable, there are probably 5-6,000 ATU-represented workers in California, including ATU 1277.

⁴³ Information taken from a fact sheet available at www.mta.net.

⁴⁴ Other operators include Alhambra, Montebello, Culver City, Pasadena, West Covina, El Monte, Torrance, Norwalk, Gardena, and Santa Clarita. Foothill Transit, operates a privatized service in the Pomona and San Gabriel valleys that took over various LACMTA in 1988. Its drivers are represented by the Teamsters and ATU. Various cities operate local shuttle services, dial-a-ride programs for seniors and the disabled, and related taxi-voucher programs.

⁴⁵ LACMTA has certain responsibilities for area freeways including towing services and planning for High Occupancy Vehicle (HOV) lanes. Such non-transit services were not affected by the strike.

⁴⁶ Data from the LACMTA proposed budget for fiscal year 2005, available at www.mta.net. Fiscal 2005 is the year ending June 30, 2005.

⁴⁷ Information on transit history in Los Angeles is available from www.metro.net/other_info/mtalibrary/transithistory.htm and from references in Edelman and Mitchell, *op. cit.* See also Transportation Research Board, *op. cit.*, for more general history of U.S. transit systems.

⁴⁸ Census data were drawn from <http://www.fhwa.dot.gov/ctpp/jtw/jtw4.htm#tra> and <http://www.losangelesalmanac.com/topics/transport.tr19.htm>. County data are apparently not available for 1980. However, in the Los Angeles Metropolitan Statistical Area, the percentage of commuters using public transportation dropped from 5.1% in 1980 to 4.6% in 1990. The figure for 2000 was little changed at 4.7%. These data include a very small fraction using taxicabs.

⁴⁹ Neil Silver, "The MTA Bargains in Bad Faith and Makes Unacceptable Proposals," *Los Angeles Times*, November 2, 2003; Kurt Streeter, Patrick McGreevy, and Mitchell Landsberg, "Tangle of Causes Fueled Dispute," *Los Angeles Times*, October 16, 2003.

⁵⁰ The opposition to Silver seemed to be based in part that by accepting the eventual binding-nonbinding arbitration approach to end the strike, he was not being aggressive enough.

⁵¹ The union made little effort at public relations during the course of the strike. LACMTA, however, did publicize its position through print and broadcast advertising and through its website.

⁵² The litigation was filed by the "Bus Riders Union," a controversial organization that has also supported unrelated causes such as the Palestinians in the Middle East and El Salvador elections. The group had tended to support LACMTA labor unions in early disputes with management and expressed support for the ATU during the 2003 strike. Its primary issue has been opposition to rail as opposed to bus service.

⁵³ Edmund D. Edelman and Daniel J.B. Mitchell, "Arbitration Can Be the Key, Despite MTA's Resistance," *Los Angeles Times*, November 6, 2003; "New Voices in MTA Strike," *Los Angeles Times*, November 10, 2003, Kurt Streeter and Sharon Bernstein, Villaraigosa Is Praised for Getting MTA Talks on Track," *Los Angeles Times*, November 28, 2003; "A Permanent MTA Solution," *Los Angeles Times*, November 18, 2003. The union vote in favor of the pact was 1,159 yes, 191 no, 5 voided.

⁵⁴ Labor Code Secs. 11137-11137.6

⁵⁵ "New Impasse Procedures for Transit Services," *California Public Employee Relations Journal*, No. 51 (December 1981), pp. 66-67.

⁵⁶ *County of Riverside et al., petitioners v. the Superior Court of Riverside County, Respondent; Riverside Sheriff's Assn., Real Party at Interest* (2003) 30 Cal. 4th 278, 160 CPER 19.

⁵⁷ Sunnyvale narrowly rejected binding interest arbitration for protective service workers in 1998. However, various forms of binding interest arbitration for protective service workers can be found in Santa Cruz, San Jose, Gilroy, Palo Alto, Hayward, Napa, San Leandro, Santa Rosa, Petaluma, and Vallejo. The Vallejo process involves item-by-item final-offer arbitration and covers all city employees. An initiative is slated for the November 2004 ballot in Santa Clara County covering certain county nurses, attorneys, and correctional officers. It proposes a system of item-by-item final-offer arbitration. The ballot outcome of this initiative is not known at the time of this writing. Under the proposed Santa Clara procedure, once the arbitration decision is made, the parties have ten days to negotiate about it. Thus, in principle they could make mutually-agreeable changes before the decision becomes final. Some of the above-mentioned cities have a similar arrangement for post-award negotiations.

⁵⁸ Recent compacts include a “Model Tribal Labor Relations Ordinance” which contain various labor-related provisions. Since the final resolution in the event of an impasse is left to a tribal forum, it remains to be seen whether such a forum will function as a neutral arbitrator or as an arm of management.